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IN THE

Supreme Court of the United States

October Term, 1950
No. 501

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
of 110 William Street, New York City,

Petitioner,

against

PAULINE CASALINO,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Statement of the Case	1
The Question Presented	3
The Gravity of the Question	4
The State Court Was Right on the Facts and on the Law. Its Rulings Raise no Federal Question, and Give no Jurisdiction for Review	5
Conclusion	7
Appendix A	8

Table of Cases Cited

Continental Cas. Co. v. Nat. Slovak Sokol, 269 N. Y. 283	6
Dailey, In re, 19 Fed. 2nd 95	6
Friedlin, In re, 21 Fed. Supp. 542	6
Tenant v. U. S. F. & G. Co., 17 Fed. 2nd 38	6
Williams v. U. S. F. & G. Co., 236 U. S. 549	6

Other Authorities Cited

New York Debtor and Creditor Law, Section 150	2
Title XI, U. S. C. A., Section 93J	2

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Statement of the Case

Hartford Accident and Indemnity Company, hereinafter referred to as petitioner, for a fee (fol. 44) furnishes indemnity bonds. That is its business (fol. 75).

In 1934, it executed and delivered to the New York State Liquor Authority, its bond (fols. 52-60)—whereunder it bound itself to pay all penalties, up to one thousand ($1,000) dollars, that said Authority might fix against Pauline Casalino, a licensee, and hereinafter referred to as respondent, for any violation by her of her liquor license.

In 1935, there was a violation (fol. 78); a penalty of one thousand ($1,000) dollars (fol. 79); and payment thereof by petitioner (fol. 80).

In 1936, petitioner sued respondent to recover this payment (fols. 73-81). The suit sounded solely in contract:

specifically (fol. 77) that "defendant (respondent here) agreed to indemnify plaintiff (petitioner here) and save it harmless from and against any and all liability, losses * * * that plaintiff might sustain by reason of having executed said bond." The complaint then recites the loss under its bond (fol. 80); demand on respondent to indemnify it for said loss (fol. 80); failure to do so (fol. 81); and demand for judgment (fol. 81).

Petitioner was awarded judgment.

In 1942, respondent filed a voluntary petition in bankruptcy (fol. 27), and on due proceedings thereunder (fol. 31) was awarded a discharge from all debts, except such as were, by the Bankruptcy Act, excepted from the operation of a discharge (fol. 32).

Petitioner knew of the proceeding (fol. 40), but did not oppose it (fol. 31), and did not seek in the proceeding a limitation that said discharge was not operative against its claim.

Yet, having been scheduled by the bankrupt, it was a party in interest, and had standing to do so.

In 1949, respondent applied, under the provisions of the New York Debtor and Creditor Law, Section 150 (Appendix A) to have petitioner's judgment marked cancelled of record, on the ground that it had been made inoperative by the discharge in bankruptcy (fol. 28).

Petitioner opposed, on the ground that it was subrogated to the rights and remedies of the Liquor Authority (fol. 42); for the bond it had issued so stipulated (fol. 57); and petitioner urged in opposition, that since the claim of the said Authority was for a penalty, and so was not provable, not dischargeable in bankruptcy (Title XI, 93J), that therefore, as subrogee, it also had a claim non-provable, non-dischargeable in bankruptcy (fol. 40).

The State court, however, ruled that petitioner's claim, as a matter of fact, and of law, was one for indemnification (fol. 17), and not by way of subrogation.

Petitioner claims this ruling is error, and that it raises a federal question; respondent opposes.

The Question Presented

The fundamental question presented, then, is not as put by petitioner, but is: did anything pass to petitioner by subrogation, and if so, just what.

And that is not a federal question.

Petitioner argues that it is the penalty due that passes, and that a penalty is non-provable, non-dischargeable in bankruptcy.

Thus, what petitioner maintains, in effect, is that if the penalty were a fine, or imprisonment on non-payment of such fine, that it, the insurance company that paid it, would as subrogee inherit the right to imprison the debtor until re-payment.

Or: may government sell to business the franchise of imprisonment for debt.

Respondent, on the other hand, claims that what passed in this case, as a matter of fact and of law, was entirely for state court determination, and did not arise under any federal statute; and that the State court has held, as a matter of fact, and a matter of law, that the penalty provision did not pass, and that petitioner is a general creditor with a breach of contract claim.

In short, there is no federal question.

The Gravity of the Question

There are thousands of little bars and grills across the State of New York, servicing their districts with the advantages that come with bibulating and social intercourse in such places. But government will not franchise them for this public service without a bond (fols. 40, 41). Petitioner, and at least the 28 other companies who now seek to intervene in this proceeding (petition, pp. 11, 12), are the source of the bonds that make these bars possible. Apparently, they execute and deliver them without security (fols. 43, 44) other than the applicant's personal promise to hold them harmless thereunder from loss.

There is glamour in the conviviality and jollity of the business, and easy bonds for bars has attracted to it operators who cut corners and end up with a penalty collected by government on the bond.

These bonding companies have had great financial loss (petition to intervene, pp. 12, 13). If they had demanded security of these bar-keepers, as they do of a lawyer who requires a bond on appeal, then bankruptcy would not invalidate their protection (fol. 44). To now make their unsecured claims non-dischargeable in bankruptcy, would be to pro-tanto nullify the theory and purpose of the Bankruptcy Act, and to create a preference for a special segment of business, and to endow it with the rights of government.

The State Court Was Right on the Facts and on the Law. Its Rulings Raise no Federal Question and Give No Jurisdiction for Review

When petitioner sued respondent in 1936, it sued in its own name, as plaintiff (fol. 74). It sued in its own right (fol. 75). As found by the State court: "it acted on its own agreement with the debtor" (fol. 17); namely (fol. 77) an agreement by respondent to pay back to petitioner any monies petitioner might be required to pay out to government under the bond.

Petitioner, to safeguard itself, could have demanded security, but didn't. It was prepared to do business without collateral. It was moved by its fee received (fol. 44) and content with a promise to be held harmless. In 1936, it was suing to enforce that promise (fol. 80).

The outcome is a matter entirely for state determination.

The State court found as a matter of fact that "it is clear that the surety enforced its (own) rights to reimbursement rather than as a subrogee of the state" (fol. 14). But regardless of what position petitioner took in said suit, the State court finds: "as the debt (the penalty) was paid (by petitioner) in full before bankruptcy the surety became the creditor and the state was eliminated (fol. 16); and the surety having obtained its judgment on the theory of indemnification it is entitled to no better position than that of a general creditor" (fols. 16, 17).

These were all matters of fact and of law for State court determination; and raised no federal question.

The State court even found, as a matter of state law, that by virtue of the time limitations of the contract of indemnity (fol. 58) that the State was foreclosed from suit for its penalty (fol. 16) and hence, petitioner had the

same limitation as subrogee (fol. 16) (citing *Continental Gas Co.* v. *Nat. Slovak Sokol,* 269 N. Y. 283).

This, too, was a matter for State court determination; and this, too, presents no federal question, and determines the right of subrogation against petitioner.

Petitioner's paying of the penalty, therefore, is a pecuniary loss. *Tenant* v. *U. S. F. & G. Co.,* 17 Fed. 2nd 38; In *re Dailey,* 19 Fed. 2nd 95. And the claim on it is provable in bankruptcy. In *re Friedlin,* 21 Fed. Supp. 542. And is dischargeable in bankruptcy. *Williams* v. *U. S. F. & G.* 236 U. S. 549.

It is just as though a dear friend, to save a friend from a jail sentence, had loaned him the money to pay the penalty. It would be a debt for money had and received: provable and dischargeable in bankruptcy. The only difference here is that petitioner does it as a business, for a fee.

Either way, government as a creditor is eliminated, and new faces, and new juridical relationships have come into being.

That, too, is a matter for State court determination, and presents no federal question.

That the parties stipulated by their agreement that the petitioner may have all the rights and remedies of enforcing a penalty (fol. 57) does not make the desired result effective. It is as ineffective as stipulating, in an agreement, that the debt covered thereby should be non-dischargeable in bankruptcy. It would be against public policy.

Conclusion

What the parties stipulated in their contract of indemnity, and what they did thereunder, and the legal effect thereof: whether it be subrogation, or a new juridical relationship, are all questions for State court determination.

There is no federal question here, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD A. GROSSMAN,
Attorney for Respondent.

SAMUEL JACOBS,
Of Counsel.

APPENDIX A

New York Debtor and Creditor Law, Section 150

Discharge of bankrupt from judgment.—At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him * * * for an order, directing the judgment to be cancelled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be cancelled and discharged of record.

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REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Respondent on the bottom of page 5 of his brief states:

> "The State court even found, as a matter of state law, that by virtue of the time limitations of the contract of indemnity (fol. 58) that the State was foreclosed from suit for its penalty (fol. 16) and hence, petitioner had the same limitation as subrogee (fol. 16) (citing *Continental Cas. Co.* v. *Nat. Slovak Sokol*, 269 N. Y. 283)."

There is nothing in the bond that would have limited the time of the State from proceeding against the principal for the penalty in the event of non-payment by the surety (fols. 52-60). Special Term appears to have misinterpreted *Continental Casualty* v. *Sokol*,

269 N. Y. 283, since the Court of Appeals at page 290 said that the action is "not on the bond", "and plaintiff is not barred from maintaining this action by reason of the limitation of time set forth in the bond."

As in the *Sokol* case, this action was not upon the bond since only the State had the right to enforce the bond. Neither the Appellate Division, nor the Court of Appeals, rendered any opinion, and it cannot be said that those courts concurred with Special Term in its interpretation of the *Sokol* case.

Respectfully submitted,

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JESSE S. RICHMAN,
Of Counsel.

Dated: New York, February 6, 1951.